2010

City of Orem v. Scott Ray Bishop : Brief of Appellee

Utah Court of Appeals

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IN THE UTAH COURT OF APPEALS

CITY OF OREM, Plaintiff/Appellee, v. SCOTT RAY BISHOP, Defendant/Appellant	APPELLEE'S BRIEF CASE No.-CA 20100962

ON APPEAL FROM JUDGMENT IN THE FOURTH DISTRICT COURT
THE HONORABLE DONALD J. EYRE, JR. PRESIDING

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STATEMENT OF JURISDICTION

The Utah Court of Appeals has jurisdiction over this matter pursuant to Utah Code Ann. § 78A-4-103(2)(e).

STATEMENT OF ISSUES AND STANDARDS OF APPELLATE REVIEW

First, Appellant challenges the trial court's findings that Appellant committed the offense of Speeding. Utah appellate courts review challenges to factual findings for clear error. Rule 52(a) of the Utah Rules of Civil Procedure provides that "Findings of fact. . . shall not be set aside [on appeal] unless clearly erroneous, and due regard shall be given to the opportunity of the trial court to judge the credibility of the witnesses." See also Utah R. App. P. 24(a)(9) (setting forth marshaling requirement to challenge fact finding); State v. Cabrera, 2007 UT App. 194 at ¶ 7, 163 P.3d 707 (stating "a trial court's factual findings may be reversed on appeal only if they are clearly erroneous".)

Second, Appellant challenges the trial court's ruling allowing the prosecutions witness to use the terms: "Driver", "Vehicle", and "Speeding". Utah appellate courts "review a trial court's decision to admit or preclude evidence under an abuse of discretion standard." State v. Jimenez, 2007 UT App 16 at ¶6; *see also* State v. Adams, 2000 UT 42 at ¶9.

Third, Appellant challenges the trial court's ruling denying the Appellant the opportunity to ask specific questions of a witness. The basis for the trial court's ruling was that such elicited testimony would be irrelevant. Utah appellate courts "review a trial court's decision to admit or preclude evidence under an abuse of discretion standard." State v. Jimenez, 2007 UT App 16 at ¶6; *see also* State v. Adams, 2000 UT 42 at ¶9.

Fourth, the Appellant challenges the standing of Appellee to prosecute the offense of Speeding. "A standing determination is primarily a question of law, although there may be factual findings that bear on the issue. Therefore, we review the district court's legal determinations for correctness but review is factual determinations with some deference to its findings." Angel Investors, LLC v. Garrity, 2009 UT 40 at ¶ 14.

DETERMINATIVE STATUTES AND RULES

U.S. Constitution, Article III, Section 2.

Utah Code Ann. § 10-3-928(2)

Utah Code Ann. § 41-6a-102(72)

Utah Code Ann. § 41-6a-601

Utah Code Ann. § 53-3-102(11)

Utah Code Ann. § 77-17-10

Utah Code Ann. § 78A-5-102(8)

Utah Rule of Appellate Procedure 11

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STATEMENT OF THE CASE

On August 27, 2010, Appellant received a citation for Speeding (30 in a 25), 41-6a-601. (Court Docket). The Appellant entered a not guilty plea and set the matter for trial on October 26, 2010. (Id.) On October 26, 2010, both parties were present , before

the Honorable Judge Eyre, in the Fourth District Court, Spanish Fork Department. (Id.) The single count of Speeding, a class C misdemeanor, was amended to an Infraction. (Id.) A bench trial was conducted. (Id.) The Appellee called one witness, Corporal Rich. (Id.) This witness was questioned by both parties. (Id.) The City rested. (Id.) The Appellant did not call any witnesses, nor did the Appellant present any evidence. (Id.) Both parties made closing arguments. (Id.) The Appellant was found guilty of the Infraction, and the court imposed a $90.00 fine. (Id.) This Appeal followed.

STATEMENT OF FACTS

On appeal from a trial court verdict, the appellate court construes the facts and draws all inferences therefrom in a light most favorable to the verdict. *See* State v. Casey, 2003 UT 55 at ¶2, 82 P.3d 1106. The Appellant certified that no transcript would be required on appeal. (Certificate That Transcript is Not Required, dated December 6, 2010.) As such, the only facts present before this Court are those that comprise the Minutes of the Bench Trial, Sentence, Judgment, and Commitment by the trial court. *See* Utah R. App. P. 11. Appellant includes a Statement of Facts, but does not include citations to the record. Therefore, those Appellant's Statement of Facts should not be considered on appeal.

SUMMARY OF ARGUMENTS

The Appellant failed to marshal any evidence supporting the trial court's findings, and establishing a flaw in the evidence. Moreover, absent a transcript of all evidence relevant to such findings or conclusions, the Court must presume that the verdict was

supported by admissible and competent evidence. As such, the Court should deny the Appellant request to review the trial court's finding and verdict.

Appellant wishes to assign special significance to the words "driver", "vehicle", and "speeding" and removing them from the realm of lay testimony. However, these words are clearly within the realm of personal observations and helpful to the clear understanding to what Corporal Rich observed on August 27, 2010. The mere use of a legally defined term does not call for a legal conclusion. Corporal Rich's testimony was factual, the Court should affirm the trial courts findings and ultimate verdict.

The Utah legislature granted the City of Orem standing to prosecute the offense of Speeding, Utah Code Ann. §41-6a-601, in the name of the State of Utah. Id. The Utah legislature provided that "[a] person may not operate a vehicle at a speed greater than is reasonable and prudent . . . any speed in excess of limits provided . . . is prima facie evidence that the speed is not reasonable or prudent and that it is unlawful." Utah Code Ann. §41-6a-601(1)-(5). The City of Orem provided evidence, beyond a reasonable doubt, which established that the Appellant, violated Utah Code Ann. § 41-6a-601. As such, the City properly prosecuted a criminal offense, which the courts have continually upheld as an Executive function and rooted in the Executive's constitutional duty to take care that the laws are faithfully executed. Therefore, the Court should reject Appellant's argument that the City of Orem did not have standing.

The questions which the trial court denied, asked for a lay witness to make a legal conclusion regarding a question of law. This type of testimony is clearly outside the scope of a lay witness. As such, the Appellant was seeking the witness to make an

opinion on a question of law, a topic left solely to trial court's determination. Further, asking a lay witness questions interpreting U.S. Supreme Court case law and standards of justiciability would not elicit testimony establishing the probability of any fact establishing the elements of Speeding, 41-6a-601. Therefore, the Court should properly deny the Appellant's due process argument and affirm the trial courts findings and verdict.

ARGUMENT

I. ABSENT A TRANSCRIPT OF ALL EVIDENCE RELEVANT TO SUCH FINDINGS OR CONCLUSIONS, THE COURT MUST PRESUME THAT THE VERDICT WAS SUPPORTED BY ADMISSIBLE AND COMPETENT EVIDENCE.

The Appellant is required to "first marshal all the evidence in support of the finding and then demonstrate that the evidence is legally insufficient to support the finding even when viewing it in a light most favorable to the court below." Utah County v. Butler, 2008 UT 12 at ¶ 11 (quoting Wilson Supply, Inc. v. Fradan Mfg. Corp., 2002 UT 94, ¶21, 54 P.3d 1177). The Appellant "***may not*** simply cite to the evidence which supports his or her position and hope to prevail." Id. (quoting Wayment v. Howard, 2006 UT 56 at ¶ 9, 144 P.3d 1147) (emphasis added). In this case, the Appellant should have "construct[ed] the evidence supporting the adversary's position, then ferret out a fatal flaw in the evidence." Id. (quoting Martinez v. Media-Paymaster Plus/Church of Jesus Christ of Latter-day Saints, 2007 UT 42 at ¶ 17, 164 P.3d 384) (internal quotations omitted). The failure to marshal evidence, submits the party to "the risk that the reviewing court will decline . . . to review the trial court's factual findings." Id.

However, the reviewing court has the discretion to "consider independently the whole record and determine if the decision below has adequate factual support." Id.

The Utah Rules of Appellate Procedure require that:

> If the appellant intends to urge on appeal that a finding or conclusion is unsupported by or is contrary to the evidence, the appellant shall include in the record a transcript of all evidence relevant to such finding or conclusion.

Utah R. App. P. Rule 11(e)(2). *See* Hatch v. Davis, 2004 UT App. 378 at ¶47. It is the Appellant's duty and responsibility to perfect the record, "[n]either the court nor the appellee is obligated to correct appellant's deficiencies in providing the relevant portions of the transcript." Utah R. App. Rule 11(e)(2). *See also*, Hatch v. Davis, 2004 UT App. 378 at ¶ 47. Where the record is incomplete, the Court is "unable to review the evidence as a whole and must therefore presume that the verdict was supported by admissible and competent evidence." Hatch, 2004 UT App. 378 at ¶ 48. *See also* Orem City v. Longoria, 2008 UT App. 168, 186 P.3d 958; State v. Rawlings, 829 P.2d 150 (Utah Ct. App. 1992); Sampson v. Richins, 770 P.2d 998, 1002 (Utah Ct. App. 1989).

Here, the Appellant filed a Formal Docketing Statement on December 15, 2010. In this Docketing Statement, the Appellant proffered two (2) issues on appeal. The first issue states "Did the Plaintiff meet its burden of proof for every element of the alleged crime?" (Appellant's Docket Statement at ¶ 7(a)). The Appellant's description of the determinative law addressed the City's ability to prosecute a traffic offense pursuant to the general justiciability principles of standing and injury in fact. The Appellant's second issue on appeal is stated in the Docket Statement as, "Was the refusal to permit

me to attack the sufficiency of the complaint a denial of due process?" (Appellant's Docket Statement at ¶ 7(b)). The Appellant never alleged any error or deficiency in the trial court's factual findings and ultimate verdict in his Docketing Statement. Further, the Appellant, on December 6, 2010, certified that "no transcript will be requested in the above entitled case." (Certificate that Transcript is Not Required).

Now at the briefing stage, the Appellant asserts that trial court's findings are in error. The Appellant argues that "[t]he trial court failed to uphold Appellee's duty to provide evidence proving Appellant guilty beyond a reasonable doubt." (Appellant Brief a p. 18). The Appellant failed to marshal any evidence supporting the trial court's findings, and establishing a flaw in the evidence. Moreover, absent a transcript of all evidence relevant to such findings or conclusions, the Court must presume that the verdict was supported by admissible and competent evidence. As such, the Court should deny the Appellant request to review the trial court's finding and verdict.

II. WITNESSES MAY TESTIFY AS TO THEIR OWN OBSERVATIONS AND PERCEPTIONS.

A witness may only testify as to "those matters of which he or she has personal knowledge." State v. Eldredge, 773 P.2d 29, 33 (Utah 1989) (Overruled in part, on different grounds by State v. Pecht, 2002 UT 41, 48 P.3d 93.) Defendant alleges that "[t]he trial court should have stricken or vacated any testimony produced by Corporal Rich because the court ruled him unable to testify." (*Appellant's Brief* at p.11.) However, the Defendant's argument is fatally flawed. Appellant provides no legal authority, beyond the mere allegation that the invocation of such words requires the Court

to strike Corporal Rich's testimony. The courts do not place any talismanic powers to legally defined words. *See* State v.Bryant, 965 P.2d 539, 548 (Utah Ct. App. 1998); State v. Larsen, 865 P.2d 1355, 1362 (Utah 1993). Utah law provides that lay witness may testify to observations, perceptions, and opinions or inferences which are rationally based on the witness's perception. *See* Utah Rule of Evidence 602 and 701. While, Rule 704 makes "it clear that questions which would merely allow the witness to tell the jury what result to reach are not permitted", the mere characterization of testimony as a legal conclusion, without more, does not exclude a lay witness's testimony. *See* State v. Larsen, 865 P.2d 1355, 1362 (Utah 1993). Specifically, a witness's casual use of a legal defined term does not rise to the level of a legal conclusion. State v.Bryant, 965 P.2d at 548. Therefore, Corporal Rich's testimony, based on his personal observations, including his usage of the terms "driver", "vehicle", and "speeding", was properly admissible.

A. The trial court never ruled Corporal Rich unable to testify.

A witness may testify only to "matters of which he has personal knowledge." State v. Powell, 2007 UT 9 at ¶ 51. At no point in the trial, did Appellant object to the ability of Corporal Rich to testify to his personal observations, nor was there any objection to his personal knowledge regarding the events of August 27, 2010. The trial court never made any finding or ruling excluding Corporal Rich's testimony. The Appellant does not cite to any portion of the record, which provides that Corporal Rich's ability to testify was challenged, let alone any preservation of the issue for Corporal Rich to testify as a fact witness. Further, the Appellant failed to marshal evidence supporting the trial court's determination that Corporal Rich's testimony was casual and factual in

nature, and not calling for a legal conclusion. Moreover, the Appellant failed to provide a transcript allowing the Court to review the entire record. As such, the Court should presume the correctness of findings by trial court allowing Corporal Rich to use the terms "driver", "vehicle", and "speeding".[1]

B. Lay witnesses may use a legal term, where testimony is factual.

Corporal Rich's usage of the legal defined terms "driver", "vehicle", and "speeding" when responding to the questions regarding his observations on August 27, 2010, do not amount to a legal conclusion. While "there is no bright line between permissible questions under Rule 704 and those that call for overbroad legal responses", the courts review whether or not the questions call for an opinion on whether certain facts met a legal definition. State v. Bryant, 965 P.2d at 548. The Utah courts have held that "a witness may use a legal term, such as "conspiracy," where the testimony is "factual and not a legal conclusion." Id. (quoting State v. Larsen, 828 P.2d 487, 493 n.8 (Utah Ct. App. 1992). As such, the usage of the terms "driver", "vehicle", and "speeding" in response to questioning regarding the officer's observations and actions do not rise to the level of testifying to a legal conclusion.

In State v. Bryant, the court reviewed on appeal a defendant's conviction for aggravated robbery, among other convictions. 965 P.2d at 541. Defendant appealed his conviction, arguing that the victim's use of the words "who had robbed us" constituted plain error. Id. at 547. At trial the following testimony was elicited:

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[1] It should be noted, that the Defendant never objected at the trial court to the officer's use of the term "speeding" and now presents this for the first time on appeal.

Q: Did you tell Marcie who had done this to you?

A: Not at that time.

Q: Okay. What happened next?

A: So the she called the police and then she [came] over to the office.

Q: How long after you had called her did she arrive at the office?

A: Oh, like two or three minutes at the most.

Q: Did you have a conversation with her then?

A: Yes. *Then I told her who had done - - who had robbed us.*

Q: Who did you tell her had robbed you and sexually abused you and entered inappropriately upon your residence?

A: Mr. Bryant.

Id. at 547. (*Emphasis in Original.*) The Bryant court recognized that the Utah Rules of Evidence limit the testimony of lay witnesses to "opinions and inference which are rationally based on the witness's perception and helpful to the factfinder to clearly understand the witness's testimony or to determine a fact in issue." Id. However, the court noted that while Rule 704 "does not allow all opinions". Id. (citing Davidson v. Prince, 813 P.2d 1225, 1231 (Utah Ct. App. 1991); *accord* State v. Larsen, 865 P.2d 1355, 1362 (Utah 1993). This rule prevents "questions which would merely allow the witness to tell the jury what result to reach". Id. However, the court stated that "the mere semantic characterization of . . . testimony as a legal conclusion does not, without more, move the testimony outside the scope of this ultimate-issue rule." Id. at 548 (quoting Larsen, 865 P.2d at 1362.)

In Bryant, the court looked at the testimony of the witness, to determine whether the prosecutor asked the questions seeking the witness to "opine as to whether the facts of [that] case met the legal definition of robbery". Bryant, 965 P.2d at 548. Ultimately the Bryant court held that the prosecutor did not ask for a legal opinion of whether the facts in that case constituted the offense of robbery, "nor may [the witness's] testimony reasonably be understood that way". Id. In so holding, the court held that a witness may use a legal term where the testimony is factual, and not making a legal conclusion. Id. As such, "the victim's casual use of the word, 'robbery', was factual, not legal. Thus the trial court did not err in allowing her testimony." Id.

Here, Corporal Rich's testimony include the usage of the terms "Driver"[2], "Vehicle"[3], and "Speeding"[4]. Appellant takes issue with the usage of these words, as they are defined by statute. However, Appellant's Statement of Facts provides that these terms used were in a "casual" and "factual" manner and not in manner opining on the ultimate issue. Appellant's Statement of Facts provides:

> Corporal Rich testified that, at approximately 5:15pm, a vehicle, described as an Acura SUV, travelling North on 400 East, approached his position, that he made a visual estimate of the vehicle's speed to be approximately 10-15 miles per hour over the posted 25 mph limit, and checked the

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[2] Driver as defined by Utah Code Ann. § 53-3-102(11): "(a) "Driver" means any person who drives, or is in actual physical control of a motor vehicle in any location open to the general public for purposes of vehicular traffic. (b) In Part 4, Uniform Commercial Driver License Act, "driver" includes any person who is required to hold a CDL under Part 4 or federal law.

[3] Vehicle as defined by Utah Code Ann. § 41-6a-102(72): "Vehicle" means a device in, on, or by which a person or property is or may be transported or drawn on a highway, except devices used exclusively on stationary rails or tracks.

[4] The elements of Speeding are listed in Utah Code Ann. § 41-6a-601.

> vehicle's speed with the Lidar unit, which registered a speed of 40 mph, for a total of 15 mph over the speed limit.
>
> Corporal Rich testified that, in making the traffic stop, "the vehicle passed me; I pulled out of the driveway, turned on my overhead lights at which point the vehicle pulled over, and I made contact with the driver of the vehicle." Corporal Rich subsequently identified Appellant as the driver of the vehicle to which he was referring. . . .
>
> Corporal Rich testified that he then issued a citation to the driver for Speeding.

(*Appellant's Brief* at p.3). From the Appellant's characterization of Corporal Rich's testimony, it should be clear that the testimony was "factual" and not calling for a legal conclusion. Corporal Rich merely described the events of August 27, 2010, stating he observed a vehicle, describing it as an Acura SUV travelling North on 400 East, stopping the vehicle and speaking with the driver.

The Appellant's argument is similar to an argument made in the Roods opinion, where it was argued that testimony regarding the gestation period for humans was beyond the scope of a lay witness. Roods v. Roods, 645 P.2d 640, 642 (Utah 1982). There, the appellant argued that "the mother's testimony with respect to gestation was reversible error [because] she did not possess sufficient medical expertise to give opinion on full-term birth." Id. The Roods court stated that, "[c]ertainly her estimation as to the period of gestation is both rationally based upon her own perception and helpful to a clear understanding of the length of term of her child." Id. The courts have further stated that "[s]imply because a question might be capable of scientific determination, helpful lay

testimony touching on the issue and based on personal observation does not become expert opinion." State v. Ellis, 748 P.2d 188, 191 (Utah 1987).[5]

The Appellant's argument fails. Appellant wishes to assign special significance to the words "driver", "vehicle", and "speeding" and removing them from the realm of lay testimony. The mere use of a legally defined term does not call for a legal conclusion. The testimony of Corporal Rich was factual, based on his personal observations. The Court should affirm the trial courts findings and ultimate verdict.

II. THE FOURTH DISTRICT COURT HAD PROPER SUBJECT MATTER JURISDICTION.

District Courts have "subject matter jurisdiction in class B misdemeanors, class C misdemeanors, infractions, and violations of ordinances." Utah Code Ann. § 78A-5-102(8). Utah Code authorizes city attorneys to "prosecute, under state law, infractions and misdemeanors occurring within the boundaries of the municipality." Utah Code Ann. § 10-3-928(2). The Utah legislature granted the City of Orem standing to prosecute the offense of Speeding, Utah Code Ann. §41-6a-601, in the name of the State of Utah. Id. On August 27, 2010, the Appellant was cited for speeding, a class C misdemeanor, within the municipal boundaries of the City of Orem. The citation was filed in the Fourth District Court, Spanish Fork Department, and prosecuted by a city attorney from the City of Orem. Prior to the trial, the City of Orem amended the citation to an infraction.

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[5] This lay witness testimony rule is encapsulated in the simple lyric "You don't need a weatherman to know which way the wind blows." (Bob Dylan, "Subterranean Homesick Blues" from *Bringing It All Back Home*.) (cited by Cobbs v. Grant, (1972) 8 Cal.3d 229, 236 [104 Cal.Rptr. 505, 502 P.2d 1]; see also Mavroudis v. Superior Court, (1980) 102 Cal.App.3d 594, 605 [162 Cal.Rptr. 724].). Jorgensen v. Beach 'N' Bay Realty, Inc., 125 Cal.App.3d 155 (1981)).

"Standing is a question of law" which the Court reviews for correctness, "affording deference for factual determinations that bear upon the question of standing, but minimal deference to the district court's application of the facts to the law." City of Grantsville v. Redevelopment Agency of Toole City, 2010 UT 38 at ¶ 9. The ultimate issue of standing is a question of law, one which the court reviews, based upon the facts presented at trial. Here, the Appellant failed to provide a transcript. Where the record is incomplete, the Court is "unable to review the evidence as a whole and must therefore presume that the verdict was supported by admissible and competent evidence." Hatch, 2004 UT App. 378 at ¶ 48. *See also* Sampson v. Richins, 770 P.2d 998, 1002 (Utah Ct. App. 1989); State v. Rawlings, 829 P.2d 150 (Utah Ct. App. 1992); Orem City v. Longoria, 2008 UT App. 168, 186 P.3d 958.

A. The Authority of the City Attorney to Prosecute Offenses Against the Laws of the State of Utah Can Not Be Seriously Questioned.

While the Appellant asserts the notion that to have standing in an Article III civil controversy, the plaintiff must have a concrete stake in the litigation and suffered an injury-in-fact, the Appellant fails to appreciate the distinctions between a civil controversy and a criminal case. *See* United States v. Ellis, 2007 U.S. Dist. LEXIS 50480 at p.2 (W.D. Pa. 2007) (Unpublished). Ultimately, the Appellant argues that the City lacked standing to initiate a prosecution. (Appellant's Brief at p. 13-18.) In short the if Appellant's argument is correct, then the vast majority of criminal prosecutions are not Article III 'cases' or 'controversies' and the executive branch lacks standing to initiate them. *See* Edward Hartnett, *The Standing of the United States: How Criminal*

Prosecutions Show that Standing Doctrine is Looking for Answers in all the Wrong Places, 97 Mich. L. Rev. 2239, 2248 (1999). "Of course, this is an absurd result." Id.

Such a reading of Article III, would essentially "prohibit the United States [and the State of Utah and local municipalities] from vindicating its sovereign interests in its own courts." Id. at 2249. In Ellis, the federal court was presented with a similar argument. Ellis, 2007 U.S. Dist. LEXIS 50480 at p.2. There, the court held that the defendant's motion to dismiss, "based on this court's Article III jurisdiction to hear the case and the United States Attorney for the Western District's standing to conduct the prosecution", "must be denied because it is based on indisputably meritless legal theory." Id. There the court looked at the text of Article III, which provides:

> The judicial Power shall extend to all Cases, in Law and Equity, arising under this Constitution, the Laws of the United States . . . -- to Controversies between two or more States; . . . between citizens of different States . . . .
>
> The Trial of all Crimes, except in Cases of Impeachment; shall be by Jury; and such Trial shall be held in the State where the said Crimes shall have been committed; but when not committed within any State, the Trial shall be at such Place or Places as the Congress may by Law have directed.

U.S. Constitution, Article III, Section 2. In reviewing the language of Article III, the court stated that "[t]o state the obvious, the founding fathers clearly contemplated prosecution of federal crimes in the courts of the United States and drafted the scope of Article III to assure that the federal judiciary would have the authority to exercise jurisdiction over such cases." Id.

The Ellis court further recognized the passage of the Judiciary Act of 1789 which "long ago gave officials acting under the Attorney General exclusive authority to control the resolution of all grand jury indictments charging federal crimes and permitted this authority to be exercised within each local district." Id. at p. 3 (citing Harold J. Krent, *Executive Control over Criminal Law Enforcement: Some Lessons from History*, 38 AMULR 275, 293-96 (Winter, 1989)). Ultimately, the court held that "[t]o suggest, as *pro se* defendant has implied, that the United States attorney needs an injury-in-fact or a personal stake in the outcome of the prosecution in order to exercise this core executive duty in addition to the constitutional authority granted by Article II is a proposition without any legislative, executive, or judicial support in the two-hundred and eighteen plus years that have passed since the passage of the Judiciary Act of 1789." Id. at p.3.

Here, the Appellant's argument is essentially that absent an "injury-in-fact" the City of Orem may not prosecute the charge of Speeding, under Utah law. Such argument is made without any support of legal precedent. Appellant relies on State v. Mauchley, 2003 UT 10 and United States v. Shunk, 881 F.2d 917 (10th Cir. 1989). Neither of these cases address the issue of whether or not the State of Utah or the United States need to provide proof an "injury-in-fact" to withstand a standing challenge. Rather these cases deal with the "corpus delicti" rule and the admission of a confession.

The Appellant's reliance on these cases is misguided. The Appellant latches onto *dicta*, which provides:

> An analysis of every crime reveals three component parts - - (1) the occurrence of the specific kind of injury or loss (as in homicide, a dead person; in arson, a burnt house; in larceny, property missing), (2)

> somebody's criminality as the source of the loss (in contracts, e.g., to an accident), and (3) the accused's identity as the doer of the crime.

Shunk, 881 F.2d at 918-19 (citing Wigmore on Evidence § 2072 (Chadbourn rev. 1978). The court then went on to define corpus delicti to mean "extrinsic evidence must establish the commission of the crime by *somebody*, or in other words, that the crime has in fact been committed." Id. at 919 (quoting United States v. Charpentier, 438 F.2d 721, 725 n.2 (10th Cir. 1971)). The *dicta* provided in the cases, merely means, that the prosecution must present extrinsic evidence that the crime has been committed. *See* State v. Mauchley, 2003 UT 10 at ¶16-17. In Mauchley, the court stated that "[f]or example, in a homicide case, the State must produce evidence that a person died and that the death was caused by a criminal act in order to establish that an injury or occurred by criminal means." Id. at ¶17. This language cannot be interpreted to mean that the State or City must suffer some palpable injury-in-fact, rather, it merely provides that to admit a confession under the Corpus Delicti rule the State has to meet an *actus rea* evidentiary threshold prior to the admission of such a confession.

Ultimately, the Court should simply review existing statutory law. Utah Code authorizes city attorneys to "prosecute, under state law, infractions and misdemeanors occurring within the boundaries of the municipality." Utah Code Ann. § 10-3-928(2). The Utah legislature granted the City of Orem standing to prosecute the offense of Speeding, Utah Code Ann. §41-6a-601, in the name of the State of Utah. Id. The Utah legislature provided that "[a] person may not operate a vehicle at a speed greater than is reasonable and prudent . . . any speed in excess of limits provided . . . is prima facie

evidence that the speed is not reasonable or prudent and that it is unlawful." Utah Code Ann. §41-6a-601(1)-(5). The City of Orem provided evidence, beyond a reasonable doubt, which established that the Appellant, violated Utah Code Ann. § 41-6a-601. As such, the City properly prosecuted a criminal offense, which the courts have continually upheld as an Executive function and rooted in the Executive's constitutional duty to take care that the laws are faithfully executed. Therefore, the Court should reject Appellant's argument that the City of Orem did not have standing.

B. Standing Is a Question of Law.

The trial court properly restricted Appellant's questioning to only relevant factual questions. While the Appellant did not provide a transcript nor marshal the evidence in regards to the trial courts evidentiary questions, such rulings were proper. Appellant alleges that he was denied his due process rights based on his inability to question the witness about the Appellee's standing. However, such questions called for legal conclusions and were irrelevant. Again, the Court does not have a complete record for which it can review the evidence as a whole.

Assuming *arguendo*, that the Appellant's Factual Statement is sufficient to review this issue on appeal. The Appellant was allowed to present evidence that there was no accident, no injury to any person, and no loss. (Appellant's Brief at p.4.) Further, the trial court instructed the Appellant that he could make the legal argument, requiring injury, at the conclusion of the case. (Id. at p.4-5.) However, the trial court sustained the objection, on the grounds of relevancy, of whether the "ticket present[s] a valid cause of action?" (Id. at p.5.) Again, the trail court sustained an objection, on the grounds of

relevancy, the question of "Are you aware, Officer Rich, that the U.S. Supreme Court has ruled that for a valid cause of action to exist the injury alleged must be, for example, distinct and palpable and not abstract or conjectural or hypothetical. . . ?" (Id. at p.6.) Last, the trial court sustained an objection, on the grounds of relevancy and legal conclusion, the question "Does this ticket present a justiciable case or controversy?" (Id.)

Evidence to be admissible must have the "tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable. . ." Utah Rule of Evidence 401. Asking a lay witness questions interpreting U.S. Supreme Court case law and standards of justiciability would not elicit testimony establishing the probability of any fact establishing the elements of Speeding, 41-6a-601.

Moreover, the questions which the trial court denied, ask for a lay witness to make a legal conclusion regarding a question of law. This type of testimony is clearly outside the scope of a lay witness. Utah recognizes the distinction between a question of law and a question of fact. See Utah Code § 77-17-10.[6] As such, the Appellant was seeking the witness to make an opinion on a question of law, a topic left solely to trial court's determination. Therefore, the Court should properly deny the Appellant's due process argument and affirm the trial courts findings and verdict.

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[6] The legislature clearly states that in criminal trials, questions of law are to be determined by the court, questions of fact by the jury. Rule 704 bars opinion testimony that advances a legal conclusion. See State v. Davis, 155 P.3d 909, 914 (Utah 2007). "[O]pinion testimony is not helpful to the fact finder when it is couched as a legal conclusion." Davis, 155 P.3d at 914-15 (citing Steffensen v. Smith's Mgmt. Corp., 862 P.2d 1342, 1347 (Utah 1993); Specht v. Jensen, 853 F.2d 805, 807 (10th Cir. 1998) (en banc) ("[I]t would be a waste of time if witnesses or counsel should duplicate the judge's statement of the law, and it would intolerably confound the jury to have it stated differently.")

CONCLUSION

The trial court acted well within it discretion, making its rulings regarding the admissibility of evidence. Absent a transcript of all evidence relevant to such findings or conclusions, the Court must presume that the verdict was supported by admissible and competent evidence. The mere use of a legally defined term does not call for a legal conclusion and the usage by Corporal Rich was factual, the Court should affirm the trial courts findings and ultimate verdict. The Utah legislature granted the City of Orem standing to prosecute the offense of Speeding, Utah Code Ann. §41-6a-601, in the name of the State of Utah. Therefore, the Court should reject Appellant's argument that the City of Orem did not have standing. The questions which the trial court denied, asked for a lay witness to make a legal conclusion regarding a question of law. This type of testimony is clearly outside the scope of a lay witness. Therefore, the Court should properly deny the Appellant's due process argument and affirm the trial courts findings and verdict.

RESPECTFULLY SUBMITTED this 7th day of March, 2011.

D. JACOB SUMMERS
Orem City Prosecutor

CERTIFICATE OF SERVICE

I hereby certify that I mailed two true and correct copies of the foregoing Appellee's Brief, postage prepaid, this 7th day of March, 2011, to the following:

SCOTT RAY BISHOP
221 North 650 East
Orem, Utah 84097

D. JACOB SUMMERS
Orem City Prosecutor

APPENDICES

U.S. Const. Art. III, Sec. 2

The judicial power shall extend to all cases, in law and equity, arising under this Constitution, the laws of the United States, and treaties made, or which shall be made, under their authority;--to all cases affecting ambassadors, other public ministers and consuls;--to all cases of admiralty and maritime jurisdiction;--to controversies to which the United States shall be a party;--to controversies between two or more states;--between a state and citizens of another state;--between citizens of different states;--between citizens of the same state claiming lands under grants of different states, and between a state, or the citizens thereof, and foreign states, citizens or subjects.

In all cases affecting ambassadors, other public ministers and consuls, and those in which a state shall be party, the Supreme Court shall have original jurisdiction. In all the other cases before mentioned, the Supreme Court shall have appellate jurisdiction, both as to law and fact, with such exceptions, and under such regulations as the Congress shall make.

The trial of all crimes, except in cases of impeachment, shall be by jury; and such trial shall be held in the state where the said crimes shall have been committed; but when not committed within any state, the trial shall be at such place or places as the Congress may by law have directed.

Utah Code Ann. § 10-3-928

Attorney duties -- Deputy public prosecutor.

In cities with a city attorney, the city attorney:

(1) may prosecute violations of city ordinances:

(2) may prosecute, under state law, infractions and misdemeanors occurring within the boundaries of the municipality;

(3) has the same powers in respect to violations as are exercised by a county attorney or district attorney, except that a city attorney's authority to grant immunity shall be limited to:

(a) granting transactional immunity for violations of city ordinances; and

(b) granting transactional immunity under state law for infractions and misdemeanors occurring within the boundaries of the municipality;

(4) shall represent the interests of the state or the municipality in the appeal of any

matter prosecuted in any trial court by the city attorney; and

(5) may cooperate with the Office of the Attorney General during investigations, including those described in Subsection 67-5-18(3)(f).

Utah Code Ann. § 41-6a-102(72)

"Vehicle" means a device in, on, or by which a person or property is or may be transported or drawn on a highway, except devices used exclusively on stationary rails or tracks.

Utah Code Ann. § 41-6a-601

Speed regulations -- Safe and appropriate speeds at certain locations -- Prima facie speed limits -- Emergency power of the governor.

(1) A person may not operate a vehicle at a speed greater than is reasonable and prudent under the existing conditions, giving regard to the actual and potential hazards then existing, including when:

(a) approaching and crossing an intersection or railroad grade crossing;

(b) approaching and going around a curve;

(c) approaching a hill crest;

(d) traveling upon any narrow or winding roadway; and

(e) approaching other hazards that exist due to pedestrians, other traffic, weather, or highway conditions.

(2) Subject to Subsections (1) and (4) and Sections 41-6a-602 and 41-6a-603, the following speeds are lawful:

(a) 20 miles per hour in a reduced speed school zone as defined in Section 41-6a-303;

(b) 25 miles per hour in any urban district; and

(c) 55 miles per hour in other locations.

(3) Except as provided in Section 41-6a-604, any speed in excess of the limits provided in this section or established under Sections 41-6a-602 and 41-6a-603 is prima facie evidence that the speed is not reasonable or prudent and that it is unlawful.

(4) The governor by proclamation in time of war or emergency may change the speed limits on the highways of the state.

Utah Code Ann. § 53-3-102(11)

(11) (a) "Driver" means any person who drives, or is in actual physical control of a motor vehicle in any location open to the general public for purposes of vehicular traffic.

(b) In Part 4, Uniform Commercial Driver License Act, "driver" includes any person who is required to hold a CDL under Part 4 or federal law.

Utah Code Ann. § 77-17-10

Court to determine law; the jury, the facts.

(1) In a jury trial, questions of law are to be determined by the court, questions of fact by the jury.

(2) The jury may find a general verdict which includes questions of law as well as fact but they are bound to follow the law as stated by the court.

Utah Code Ann. § 78A-4-103(2)(e)

(2) The Court of Appeals has appellate jurisdiction, including jurisdiction of interlocutory appeals, over:

...

(e) appeals from a court of record in criminal cases, except those involving a conviction or charge of a first degree felony or capital felony;

....

Utah Rule Appellate Procedure 11(e)(2)

(e)(2) Transcript required of all evidence regarding challenged finding or conclusion. If the appellant intends to urge on appeal that a finding or conclusion is unsupported by or is contrary to the evidence, the appellant shall include in the record a transcript of all evidence relevant to such finding or conclusion. Neither the court nor the appellee is obligated to correct appellant's deficiencies in providing the relevant portions of the transcript.

Utah Rule Appellate Procedure 24(a)(9)

(a)(9) An argument. The argument shall contain the contentions and reasons of the appellant with respect to the issues presented, including the grounds for reviewing any issue not preserved in the trial court, with citations to the authorities, statutes, and parts of the record relied on. A party challenging a fact finding must first marshal all record evidence that supports the challenged finding. A party seeking to recover attorney's fees incurred on appeal shall state the request explicitly and set forth the legal basis for such an award.

Utah Rule of Civil Procedure 52(a)

(a) Effect. In all actions tried upon the facts without a jury or with an advisory jury, the court shall find the facts specially and state separately its conclusions of law thereon, and judgment shall be entered pursuant to Rule 58A; in granting or refusing interlocutory injunctions the court shall similarly set forth the findings of fact and conclusions of law which constitute the grounds of its action. Requests for findings are not necessary for purposes of review. Findings of fact, whether based on oral or documentary evidence,

shall not be set aside unless clearly erroneous, and due regard shall be given to the opportunity of the trial court to judge the credibility of the witnesses. The findings of a master, to the extent that the court adopts them, shall be considered as the findings of the court. It will be sufficient if the findings of fact and conclusions of law are stated orally and recorded in open court following the close of the evidence or appear in an opinion or memorandum of decision filed by the court. The trial court need not enter findings of fact and conclusions of law in rulings on motions, except as provided in Rule 41(b). The court shall, however, issue a brief written statement of the ground for its decision on all motions granted under Rules 12(b), 50(a) and (b), 56, and 59 when the motion is based on more than one ground.

Utah Rule of Evidence 401
Definition of "relevant evidence."

"Relevant evidence" means evidence having any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence.

Utah Rule of Evidence 602
Lack of personal knowledge.

A witness may not testify to a matter unless evidence is introduced sufficient to support a finding that the witness has personal knowledge of the matter. Evidence to prove personal knowledge may, but need not, consist of the witness' own testimony. This rule is subject to the provisions of Rule 703, relating to opinion testimony by expert witnesses.

Utah Rule of Evidence 701
Opinion testimony by lay witnesses.

If the witness is not testifying as an expert, the witness' testimony in the form of opinions or inferences is limited to those opinions or inferences which are (a) rationally based on the perception of the witness, (b) helpful to a clear understanding of the witness' testimony or the determination of a fact in issue, and (c) not based on scientific, technical, or other specialized knowledge within the scope of Rule 702.

LEXSEE 2007 U.S. DIST. LEXIS 50480

UNITED STATES OF AMERICA vs. PATRICK DAVID ELLIS

2:06cr390

UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF PENNSYLVANIA

2007 U.S. Dist. LEXIS 50480

July 12, 2007, Decided

July 12, 2007, Filed

COUNSEL: [*1] PATRICK DAVID ELLIS (1), Defendant, Pro se, Pittsburgh, PA.

For PATRICK DAVID ELLIS (1), Defendant: W. Penn Hackney, LEAD ATTORNEY, Federal Public Defender's Office, Pittsburgh, PA.

For USA, Plaintiff: Charles A. Eberle, LEAD ATTORNEY, United States Attorney's Office, Pittsburgh, PA.

JUDGES: David Stewart Cercone, United States District Judge.

OPINION BY: David Stewart Cercone

OPINION

MEMORANDUM ORDER

AND NOW, this 12<th> day of July, 2007, upon due consideration of *pro se* defendant's motion requesting appointment of paralegal and private investigator, IT IS ORDERED that the motion [46] be, and the same hereby is, denied to the extent defendant seeks such assistance to present a motion to dismiss challenging this court's

Article III jurisdiction to hear the case and the United States Attorney for the Western District's "standing" to conduct the prosecution against him and denied without prejudice to renew with specific reasons why the requested services are necessary to an adequate defense in all other aspects.

Under the Criminal Justice Act at *§ 3006A(e)(1)*, the court may provide investigative, expert, or other services to a person who is financially unable to obtain those services only where the services are "necessary [*2] for adequate representation." *18 U.S.C. § 3006A(e)(1)*. In any such request for services the defendant must set forth the specific reasons why the services are necessary for his defense, explain precisely how the services will be used to support the defendant's legal theories, and state why the work needed for the defendant's case cannot currently be performed. *Christian v. United States 398 F.2d 517, 519 (10th Cir. 1968)*; *United States v. Davis, 582 F.2d 947, 951 (5th Cir. 1978)*; *United States v. Goodwin, 770 F.2d 631, 634 (7th Cir. 1985)*.

Defendant's request before the court insufficiently describes why the services of a paralegal and private investigator are necessary to the presentation of an adequate defense. There is no explanation of how *pro se* defendant intends to use a paralegal and private investigator to support his defense beyond general statements about the need for case law research and documenting the scene of the alleged crime. The request also does not sufficiently explain why the work needed for an adequate defense cannot be performed through services already available given that the request expressly acknowledges that assistance with the locating case law has already [*3] been offered by stand-by-counsel and his office.

Moreover, to the extent *pro se* defendant has requested and intends to request such services to aid him in presenting a motion to dismiss based on this court's Article III jurisdiction to hear the case and the United States Attorney for the Western District's "standing" to conduct the prosecution, the motion must be denied because it is based on indisputably meritless legal theory. Although *pro se* defendant has latched on to the notion that to have standing in an Article III civil controversy, the party bringing the action must have a concrete stake in the litigation and have suffered an injury-in-fact, he fails to appreciate the distinctions to be drawn between a criminal case and a civil controversy. And while the broad language appearing in some of the more recent Supreme Court opinions expounding on the limitations of Article III standing would appear at first brush to be irreconcilable with the traditional mechanics employed in conducting criminal prosecutions, dogmatically drawing a corollary conclusion that federal criminal prosecution is outside the jurisdictional reach of Article III is tantamount to the "absurd." See Edward Hartnett, [*4] *The Standing of the United States: How Criminal Prosecutions Show that Standing Doctrine is Looking for Answers in all the Wrong Places, 97 Mich.L.Rev. 2239 (1999)* (to reason and conclude from the current status of the Court's Article III standing doctrine that "the vast majority of federal criminal prosecutions are not 'cases' or 'controversies' and the United States lacks standing to initiate them [would,] ... [o]f course, [amount to] an absurd result."). Furthermore, while there are several approaches that might be employed to harmonize the seemingly inconsistent principles present in federal criminal prosecutions with the Court's current approach to defining the outer scope of private causes of action challenging the actions of government officials under Article III, we need not delve into that foray to discard the notion that defendant may not be prosecuted by the Justice Department for violation of federal law on the junk pile of needless intellectual exercises in futility. *See id.* (noting that "Article III cannot sensibly be read to prohibit the United States from vindicating its sovereign interests in its own courts" and summarizing the various scholarly approaches that have [*5] been used to reconcile federal criminal

prosecutions with the Court's current standing jurisprudence). We merely look to the text of Article III itself and the body of scholarly opinion on the topic to assure ourselves that the conclusion we have reached is the right one.

The text of Article III provides:

> The judicial Power shall extend to all Cases, in Law and Equity, arising under this Constitution, the Laws of the United States ... -- to Controversies between two or more States; ... between citizens of different States ....
>
> * * *
>
> The Trial of all Crimes, except in Cases of Impeachment; shall be by Jury; and such Trial shall be held in the State where the said Crimes shall have been committed; but when not committed within any State, the Trial shall be at such Place or Places as the Congress may by Law have directed.

U.S. Constitution, Article III, Section 2. To state the obvious, the founding fathers clearly contemplated prosecution of federal crimes in the courts of the United States and drafted the scope of Article III to assure that the federal judiciary would have the authority to exercise jurisdiction over such cases. The prosecution of defendant for violation of the laws of the United [*6] States presents precisely the type of case falling within the scope of that constitutional authority.

Moreover, lest there be any question about this court's authority to exercise jurisdiction over defendant's prosecution, one need only survey the vast array of authority conceding that "the term 'cases' in Article III includes criminal prosecutions, while the term 'controversies' does not." Hartnett, *The Standing of the United States: How Criminal Prosecutions Show that Standing Doctrine is Looking for Answers in all the Wrong Places, 97 Mich.L.Rev. at 2249* & n. 56 (collecting scholarly works in support). And while one can question the ramifications of this truism on the soundness of current Article III standing doctrine, that does not change the accepted principle the "[i]n criminal cases (and perhaps more generally in Article III 'cases'), the judiciary is enforcing the sovereign's law rather than umpiring a preexisting dispute [and] [t]hus, criminal prosecutions demonstrate that, at least when exercising jurisdiction over the 'cases' enumerated in Article III, nothing in Article III limits the use of the federal judicial power to enforcement of the rights of individuals or prohibits [*7] the use of the federal judicial power to enforce the majoritarian sovereign will." *Id. at 2251.*

Nor can the authority of the United States attorney to prosecute offenses against the laws of the United States be seriously questioned. Through the passage of the Judiciary Act of 1789 Congress long ago gave officials acting under the authority of the Attorney General exclusive authority to control the resolution of all grand jury indictments charging federal crimes and permitted this authority to be exercised within each local district. *See* Harold J. Krent, *Executive Control over Criminal Law Enforcement: Some Lessons from History,* 38 AMULR 275, 293-96 (Winter, 1989). And the congressional directive to exercise this discretionary authority continues to this day and has a direct application to defendant's prosecution. *See 28 U.S.C. § 547(1)* ("... each United States attorney, within his district, shall -- (1) prosecute for all offenses against the United States..."); *see also 28 U.S.C. § 541(a)* ("The President shall appoint, by and with the advice and consent of the Senate, a United States attorney for each judicial district.").

Of course, the exercise of such authority has long been recognized [*8] as a core executive function having firm constitutional footing. *See Heckler v. Chaney, 470 U.S. 821, 831, 105 S. Ct. 1649, 84 L. Ed. 2d 714 (1985)* ("Finally, we recognize that an agency's refusal to institute proceedings shares to some extent the characteristics of the decision of a prosecutor in the Executive Branch not to indict-a decision which has long been regarded as the special province of the Executive Branch, inasmuch as it is the Executive who is charged by the Constitution to 'take Care that the Laws be faithfully executed.'") (citing *U.S. Const., Art. II, § 3*); *Community for Creative Non-Violence v. Pierce, 252 U.S. App. D.C. 37, 786 F.2d 1199, 1201 (D.C. Cir. 1986)* (holding that power to decide to investigate and to prosecute "lies at the core of the Executive's duty to see to the faithful execution of the laws".); *United States v. Cox, 342 F.2d 167, 190 (5th Cir.)* (opinion of Wisdom, J.) (finding that "[t]he prosecution of offenses against the United States is an executive function within the exclusive prerogative of the Attorney General . . ."), *cert. denied, 381 U.S. 935, 85 S. Ct. 1767, 14 L. Ed. 2d 700 (1965)*; *United States v. Alessio, 528 F.2d 1079, 1081-82 (9th Cir.)* (holding that Executive's power to determine which cases will be prosecuted is rooted [*9] in Executive's constitutional duty to take care that laws of United States are faithfully executed), *cert. denied, 426 U.S. 948, 96 S. Ct. 3167, 49 L. Ed. 2d 1184 (1976)*. To suggest, as *pro se* defendant has implied, that the United States attorney needs an injury-in-fact or a personal stake in the outcome of the prosecution in order to exercise this core executive duty in addition to the constitutional authority granted by Article II is a proposition without any legislative, executive, or judicial support in the two-hundred and eighteen plus years that have passed since the passage of the Judiciary Act of 1789. In fact, the uniform consensus is to the contrary. See Hartnett, *The Standing of the United States: How Criminal Prosecutions Show that Standing Doctrine is Looking for Answers in all the Wrong Places, 97 Mich.L.Rev. at 2251* ("In short, if--as all concede--the United States can prosecute crimes in the federal courts, then a 'case' within the meaning of Article III must include litigation that is based on nothing more than the 'harm to the common concern for obedience to law,' and the 'abstract . . . injury to the interest in seeing that the law is obeyed.'"). Given the long-standing congressional recognition [*10] of the United States attorney's constitutional obligation to prosecute offenses against the laws of the United States and the uniform scholarly acknowledgment that such Justice Department employees properly may do so pursuant to Article II's commitment to the executive branch to enforce the interest of the sovereign in seeking to vindicate the general public interest in compliance with the law, defendant's effort to utilize scarce Criminal Justice Act resources to mount a defense based on contrary principles properly is denied.

David Stewart Cercone

United States District Judge